IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

A relatively short reply will serve to demonstrate the obvious infirmities of the Government's voluminous brief in this case.

I

A. The Government starts its argument (U. S. Br. 21) by quoting that portion of the opinion in *Hoffman* v. *United States*, 341 U. S. 479, 486, which commences by saying that

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.

But the Government's brief, though it extends over 80 pages, never goes on to quote the last portion of the paragraph in question, *viz.*,

> However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result.

(We have italicized the conditional words to emphasize that certainty of incrimination is not a prerequisite to successful invocation of the constitutional privilege.)

Nor does the Government at any point quote the further portion of the *Hoffman* opinion, *id.* at 488, where the Court said that

> Petitioner could reasonably have sensed the peril of prosecution for federal offenses ranging from obstruction to conspiracy.

The omitted portions of the *Hoffman* opinion necessarily undercut all of the Government's obviously labored endeavors (U. S. Br. 14-18, 21-55) to whittle down the privilege against self-incrimination to the point where it would be available only in circumstances where the assertion that an answer would be incriminating would in and of itself incriminate the witness.

B. Here, petitioner showed that he had not filed any social security or withholding tax return (R. 37a). He showed that such returns would have been required as a matter of federal law, if while engaged in a business unlawful under state law, he had any employees in such business (R. 19a-26a). He showed that the nature of the numbers business was such that it required employees (R.

25a-26a). He stated that he had used his telephone "not for my lawful business" (R. 8a). And he showed that the prosecutor had announced in the public press an intention to strike at "numbers, slot machines and other rackets * * * through the Federal revenue and conspiracy laws" (R. 196a) "even though there are no Federal laws regarding numbers" (*ibid.*), and that his own fear of self-incrimination was based in part on what he had read in the newspapers (R. 56a, 132a, 176a).

Moreover, if petitioner testified to being engaged in any business, whether lawful under both state and federal law, or unlawful under either, that fact would be relevant to prove that he had previously been engaged in that business. See *Johnson* v. *United States*, 318 U. S. 189, 195-196. If, therefore, the proceeds of that business had not been reflected in his records or returns, he could not possibly answer any question relating to that business without incriminating himself under Sections 145(c) or 3809(a) of the Internal Revenue Code, regardless of the nature of that business. And, significantly, this grand jury was investigating violations of the internal revenue laws (R. 2a), and the prosecutor had announced that he was striking at "numbers * * * and other rackets * * * through the federal revenue and conspiracy laws" (R. 196a, 197a).

In those circumstances, we submit, petitioner had shown enough to indicate that he was in danger without going on to testify that in fact he himself had employees in his ventures, or that he himself was in the numbers business or concerning the unlawful business for which he used his telephone. The answers to such questions were the critical links in the chain; affirmative answers would have been admissions of guilt. In any event, petitioner had shown enough to be justified in believing that he was in a precarious position. Therefore, as the *Hoffman* case teaches, 341 U. S. at 488-489,

> In this setting it was not "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the an-

> swer[s] cannot possibly have such tendency" to incriminate. *Temple* v. *Commonwealth*, 75 Va. 892, 898 (1880), cited with approval in *Counselman* v. *Hitchcock*, 142 U. S. 547, 579-580 (1892). See also, *Arndstein* v. *McCarthy*, 254 U. S. 71 (1920).

Certainly petitioner's danger was real; it was neither remote nor imaginary; and in the setting in which it was asked, having particular reference to the prosecutor's announced intention to strike at "numbers" through the revenue laws (R. 196a, 197a), he had shown, not only that disclosure "might be dangerous" (*Hoffman* at 487), but that it would be, particularly, in view of the significance, in federal tax prosecutions, of admitting that one is engaged in an income producing business. See Appendix, pp. 16 *et seq., infra.*

C. The Government argues (U. S. Br. 16; see also U. S. Br. 43-45, 49-51, 54) that

> The admission by petitioner that he is in the numbers business has no significant tendency to show that he is an employer in that business. He might be and he might not be.

But petitioner's claim of privilege was rested in part (R. 132a, 176a, quoted at U. S. Br., note 3 at p. 8) on "my own inherent belief of self-incrimination due to the fact that I have knowledge of what my answers to the refused questions would be." Therefore, as in *Hoffman*, "it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." Petitioner here, as in *Hoffman*, "could reasonably have sensed the peril of prosecution." That is sufficient under the decisions of this Court.

D. The same considerations apply to the identification question, *Who?*, asked after petitioner had admitted knowing numbers writers, or men who are in the numbers business, around his place of business (R. 5a-6a). He had

earlier been asked whether he had met Willie Weisberg and Cappy Hoffman around the same address (R. 3a)—and these two were the Weisberg and the Hoffman of *Hoffman* v. *United States, supra.*[1]

The same reasons that were held to justify Hoffman in refusing to answer as to Weisberg justify this petitioner, in the present setting, in refusing to answer *Who?* the numbers writers were. Nor is the Government on sound ground when it attempts to distinguish the *Who?* question here, said to involve only acquaintanceship, from the similar question asked in *(Patricia) Blau* v. *United States,* 340 U. S. 159, where, according to the Government, "the matter concerned a clandestine, conspiratorial association." U. S. Br. 17; see also U. S. Br. 51-55. For here the prosecutor had specifically announced that he would avail himself of the Federal conspiracy laws to strike at numbers (R. 196a). The newspapers had reported (R. 197a) that "Goldschein himself stressed the importance of 'conspiracy' * * *"—and petitioner's fear of incrimination rested in part on what he had read in the newspapers (R. 132a, 176a, U. S. Br. 8, note). In that setting, surely, "Petitioner could reasonably have sensed the peril of prosecution for * * * conspiracy." *Hoffman* at 488.

E. The Government says (U. S. Br. 48), "It would be difficult to read the record here and not realize that everybody knows that petitioner is in the numbers business." Does not this statement come perilously close to flouting the statutory policy (18 U. S. C. [Supp. IV] 3481) that no adverse comment shall be made when the privilege against self-incrimination is invoked? *Cf. Bruno* v. *United States,* 308 U. S. 287.

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[1] See 341 U. S. at 488 (Weisberg was a fugitive from justice); *id.* at 489 (Hoffman had a criminal record extending over 20 years); and see the record in that case, R. 11-14, No. 513, Oct. T. 1950.

II

The Government devotes nearly twenty printed pages of argument (U. S. Br. 62-81) to establishing what petitioner concedes at the outset, *viz.*, that Grand Jury minutes and papers in the files of Government offices are normally not subject to disclosure.

The issue here is wholly different. The issue here is whether, when the Government prosecutes an individual for the criminal contempt involved in refusal to answer questions, claimed by him to be incriminating, it may continue to assert the usual privilege attaching to such documents when he needs them to establish his defense. By asserting the privilege in these circumstances, as it does, the Government is prosecuting an individual while simultaneously denying him the right to defend. We should have supposed that such a practice would be so obviously condemned by the most elementary considerations of fairness implicit in the concept of Due Process of Law that it would be unnecessary to invoke authority in support of such condemnation.[2]

It is suggested by the Government that petitioner's request for the minutes was a mere "fishing expedition" (U. S. Br. 70), and his application for the prosecutor's file "a broadside request" (U. S. Br. 80). The short answer

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[2] See cases cited at Pet. 23-24, notably *United States* v. *Zwillman*, 108 F. 2d 802 (C. C. A. 2), and *United States* v. *Remington*, 191 F. 2d 246 (C. A. 2), certiorari denied, March 24, 1952 (No. 387, this Term). The Government attempts (U. S. Br. 72-74) to distinguish the *Zwillman* case, by asserting that its language could be more narrowly construed. We think it sufficient to point out that it was employed by a meticulously careful judge (A. N. Hand, J.), speaking for colleagues neither given to nor tolerant of loose language (Swan and Clark, JJ.), and that what was said there may accordingly be taken at full face value.

The Government says nothing as to the ruling in the *Remington* case dealing with its duty to furnish the grand jury minutes (191 F. 2d at 250), doubtless because there is nothing it can say.

is that these objections are afterthoughts, and that both the Government's objections and the trial judge's rulings in the district court relative to the furnishing of the documents sought were based on a denial of petitioner's right, not on any asserted infirmity in the form or scope of his request (R. 52a-54a; for the pre-trial objections and rulings, see R. 99a-101a, 109a-111a, 147a-148a, 149a-152a).

Finally, the Government says (U. S. Br. 70-71), "Nothing in the grand jury minutes could have added substance and concreteness to the claim of danger." This statement, obviously, begs the question. Significantly enough, in a related contempt case which involved the same grand jury, the same prosecutor, and the same district judge (*United States* v. *Singleton*, 193 F. 2d 464 (C. A. 3), pending on defendant's petition for certiorari, No. 666, this Term), the court below, in affirming the conviction, examined and considered the government's file and the grand jury minutes, and indicated its opinion (193 F. 2d at 468) that the trial judge should have considered those documents also, "in the liberal view of the Hoffman decision." No such examination was made here, no such consideration was given here—although this case was remanded for reconsideration in the light of *Hoffman* (341 U. S. 944; R. 244).

The rulings below under the present heading are thus erroneous even on the face of the *Singleton* decision in the court below. And, at the very least, in the absence of a disinterested examination, petitioner is certainly not bound by the statement in the Government's brief as to what the papers he requested in order to establish his defense might or might not show.

III

The remaining questions in the case are consequences of the material—and disturbing—variances between what is recited in the formal judgment and commitment (R. 198a-201a) and what actually appears in the record of trial. The basic discrepancy turns on the circumstance

that whereas the presentment of the grand jury alleged a refusal to answer four questions before the grand jury in violation of 18 U. S. C. 401(1) as well as a deliberate disobedience of an order of the district court to answer those same four questions in violation of 18 U. S. C. 401(3), see R. 8a, in respect of which, after trial, the judge made a general finding of guilty (R. 65a), the formal judgment and commitment (R. 198a-201a) omitted all reference to the first unanswered question, *Are you in the numbers business now?*, and also omitted all reference to the refusal to answer questions before the grand jury; it set out only a disobedience of the order of the judge to answer the three remaining questions. See Pet. 11, 18.

A. Our statement (Pet. 21) that "the sole emphasis at the trial was on petitioner's alleged violation of 18 U. S. C. 401(1)" is challenged by the Government. U. S. Br. 57, n. 19. But the record sustains petitioner's contention; here are the relevant excerpts:

> THE COURT: * * * Mr. Greenberg, the Grand Jury has returned a presentment against you in which the presentment alleges that five questions were asked which you refused to answer. (R. 10a.)
>
> * * * * *
>
> I am just going to ask him now whether he refused to make these answers in the Grand Jury room * * * (R. 11a.)
>
> * * * * *
>
> The third question asked you before the Grand Jury was; the question that you refused to answer * * * (R. 11a.)
>
> * * * * *
>
> Now, those questions were asked you in the Grand Jury and you have refused to answer them, is that correct?
>
> (Mr. Greenberg at the bar.)
>
> MR. GREENBERG: Yes, sir. (R. 13a.)
>
> * * * * *
>
> THE COURT: * * * Now, you say those are the questions you were asked in the Grand Jury room? R. 14a.)

Up to this point there is not a word about any order of the court, nor a syllable of inquiry regarding questions which the witness was required or ordered or directed by the court to answer. At the trial, the transcripts of the pretrial hearing were introduced (R. 14a-15a), but these contain only two rulings, and neither is shown to have been made in petitioner's presence (R. 231, 146a). No other evidence of any order by the court was introduced. After the evidence was in, the trial judge said (R. 65a),

> I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't, I am ready to impose sentence. Do you want to answer?
>
> Mr. Witkin: We take the same position we have taken before, may it please Your Honor.

Again, not a word about any order to answer. In the formal judgment, however, the foregoing was embellished to read (R. 201a):

> And it further appearing to the Court that on the 8th day of November in the year 1950 this Court gave the said witness, Irving Greenberg, another opportunity to answer the said questions and he, through his counsel, stated in open court that he would not obey the Order of this Court and answer the questions which the Court directed him to answer as hereinabove set forth, thereby thwarting the investigation of the said Grand Jury and obstructing the administration of justice.[3]

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[3] The Government's position seems to be that although counsel's answer, "We take the same position as we have taken before" is equivalent to a deliberate flouting of a judicial order by the client (U. S. Br. 62), so that the client must bear the burden of his lawyer's views, the client is not entitled to avail himself of any aspect of a claim of privilege made by his counsel in the course of argument. See U. S. Br. 53, n. 18. The obvious thread of consistency here is that the invocation of the constitutional privilege must be discouraged because (U. S. Br. 65-66) "it represented an interference with legitimate investigative efforts."

It follows that petitioner was correct in stating (Pet. 21) that all the emphasis at the trial was on the refusal to answer questions and not on a disobedience of orders to answer.

B. The foregoing review of the record documents petitioner's assertion (Pet. 19) that "the record shows neither proof of any order by the district court, nor of any disobedience of such an order." The Government's contentions to the contrary (U. S. Br. 60-62) rest in part on the view that petitioner's counsel knew that the judge had made a ruling, in part on the circumstance that 18 U. S. C. 401(3) punishes disobedience of a court's "rule", and in part (U. S. Br. 62, n. 23a) on the recitals in the judgment which, as we have shown, do not accurately reflect what is shown in the record.

Petitioner was not charged with disobeying a "rule" of court. The presentment alleged (R. 4a) that the court "ordered [petitioner] to return before the Grand Jury and answer the said questions which he had refused to answer," and (R. 8a) that petitioner—

> has willfully, deliberately and contumaciously disobeyed and resisted the lawful order and command of this Honorable Court by willfully and deliberately refusing to obey the Order of this Court to answer before the Grand Jury the aforesaid questions.

In other words, the allegation was that petitioner willfully disobeyed the direct command and order of the judge that he answer questions before the grand jury. We submit that the record of the contempt trial (R. 10a-71a), the pertinent portions of which we have set out above, pp. 8-9, fails completely to show the disobedience which was charged in the presentment.

C. The Government now argues (U. S. Br. 59) that "even if the oral finding did find petitioner in contempt in every respect as charged in the presentment, the omission in the formal judgment of some of the specifications em-

bodied in the oral pronouncement was not detrimental to him, but rather to his benefit, for such omissions constituted, in effect, a vacation of part of the judgment." Of course this rationalization is not supported by the record.

The basic issue at the pre-trial hearings revolved around the propriety of asking petitioner whether he was in the numbers business. As the trial judge said (R. 145a-146a),

> These repeated refusals to answer concern itself with the basic question "Are you in the numbers business?" I think that the continued getting around it in various or different variations with respect to it, since counsel have chosen to make their stand, I think they ought to go up on the question "Are you in the numbers business?" I don't understand the Government's position. Is it that you think eventually you are going to get the answer, Mr. Goldschein?
>
> MR. GOLDSCHEIN: Yes.[4]
>
> THE COURT: Don't you think we would be better off to get a ruling from the Circuit Court as to that main question rather than side issues? I don't mean by that in anywise to say that it isn't pertinent and necessary, but aren't we just getting around, if he refuses to answer that he is in the numbers business, you have the unlawful business specifically decided, and the Court will decide. Why don't you go up on the main issue as to whether or not he is in the numbers business?

That the question whether petitioner was in the numbers business remained basic until the end is shown by what the trial judge said just prior to sentence (R. 71a):

> THE COURT: No, I don't see much difference between this and the *Hoffman* case. It goes down to a question of whether a man can decline to answer when he is asked, "What is your business?" whether in the numbers business, the answer to which is violative of a state statute but does not give any right to predicate a claim for self-incrimination here.

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[4] The importance of this particular answer, in the light of Mr. Goldschein's announced plan to strike at "numbers" through the federal revenue laws (R. 196a), is explained in the Appendix, pp. 16 *et seq.*, *infra*.

Undoubtedly it was within the court's power to vacate a portion of the judgment, although with the background of emphasis on the basic question whether petitioner was in the numbers business, it would seem more likely that, if such action had been intended, some explanation thereof would have been made. The circumstance that the record contains no explanation why all reference to petitioner's refusal to answer the basic question was omitted, together with the striking disparity between what petitioner actually said in court (R. 65a; quoted *supra*, p. 9) and what the formal judgment alleges he said (R. 201a; also quoted *supra*, p. 9), would seem very definitely to establish that "a vacation of part of the judgment" (U. S. Br. 59) was simply not under consideration when that judgment was signed.

D. The foregoing state of affairs introduces the next problem, *viz.*, whether the court below extended its review when considering this case a second time.

(i) In its first opinion, by dealing with the recitals in the formal judgment rather than with the record of trial, the court below passed over the alleged incriminatory character of the question *Are you in the numbers business now?* (R. 236). Our contention that, in its second opinion, the court below considered this question and held it non-incriminatory (Pet. 18-19) is challenged by the Government (U. S. Br. 13, n. 5; 59, n. 21), which, however, "does not rely upon petitioner's refusal to answer that question as a basis for supporting the judgment below" (U. S. Br. 13, n. 5).

In its second opinion, the court below said (R. 247) that "everything in the record suggests that the unlawful business in which [petitioner] might be engaged is the so-called 'numbers' business, an activity proscribed by Pennsylvania law and to which his constitutional immunity does not extend," citing *United States* v. *Murdock*, 284 U. S. 141.

From what source did the court below derive the foregoing suggestion if not from the unanswered question *Are you in the numbers business now?* And is not the reference to the *Murdock* doctrine proof positive that it considered that basic unanswered question non-incriminatory? To put these inquiries is to answer them. And, assuredly, the Government's present reluctance to rely on petitioner's refusal to answer the basic question (U. S. Br. 13, n. 5; 59) strongly suggests the true reason for the omission of that question from the formal judgment.

(ii) By a similar looking to the recitals in the formal judgment rather than to the happenings at the trial, the court below in its first opinion (R. 236) expressly passed over the question whether petitioner "in claiming his constitutional privilege under advice of counsel, as he did, could be convicted of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury"; and it added (R. 236), "Certainly the assertion of a constitutional right if made in good faith on advice of counsel could hardly be described as such misconduct."

Here again, this view serves to suggest the real reason why all reference to the alleged violation of 18 U. S. C. 401(1) was omitted from the formal judgment. But since it is the formal judgment pronounced in court rather than the later formal commitment which controls, *Hill* v. *United States*, 298 U. S. 460, the finding of guilty in respect of refusal to answer questions before the grand jury must be considered, particularly since, as we have shown (*supra*, pp. 8-10) that was the only issue canvassed at the trial.

E. Apart from the discrepancies which we have herein outlined at length, it is apparent that the court below proceeded without regard to the record. Thus in its second opinion it said (R. 247), "In the absence of any contention

on Greenberg's part that the mere disclosure of his business, as such, may tend to incriminate him of a federal crime we regard the ruling of the Supreme Court in *Hoffman's* case as wholly inapplicable." But the very terms of the presentment showed that petitioner specifically and explicitly refused to answer the question *Are you in the numbers business now?* "because the answer I would give you will tend to incriminate me of a violation of the Federal Criminal Statutes" (R. 4a); and the same answer was in fact given in respect of the other business questions (see R. 173a-180a).

Does not such blind adjudication, do not the discrepancies between the record of trial and the formal judgment adverted to above, serve far more to "obstruct the administration of justice"?

IV

It is apparent from the Government's brief that its law officers are less concerned over the vindication of the constitutional command that "No person * * * shall be compelled in any criminal case to be a witness against himself" than they are over the effect which ungrudging compliance with that mandate will have upon investigation and prosecution. See U. S. Br. 56, 65-66.

We had supposed that what this Court in the *Hoffman* case had said of the constitutional provision in question (341 U. S. at 486) would have been dispositive of any such argument:

> This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Feldman* v. *United States*, 322 U. S. 487, 489 (1944). This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure. *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892); *Arrdstein* v. *McCarthy*, 254 U. S. 71, 72-73 (1920).

We agree with what the trial judge said just before sentencing petitioner here (R. 71a), "I don't see much difference between this and the *Hoffman* case." We submit, therefore, that this Court's decision in *Hoffman* requires a similar judgment of reversal in the case at bar.

CONCLUSION

For the reasons set out in the Petition for Certiorari, which serves as the petitioner's brief in chief, and for the foregoing additional reasons, the judgment below should be reversed.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

APRIL 1952.

[Please turn the page for the Appendix.]

APPENDIX.

Why the Prosecutor in this Case Wanted Petitioner to Admit Being in the Numbers Business.

Throughout its brief, the Government now seeks to minimize the danger to petitioner involved in his admitting being engaged in the numbers business. See U. S. Br. 37, 42-45, 47, and especially 48-49, *viz.*:

> It is also clear that, so far as petitioner is concerned, the admission that he is in the numbers business cannot provide any clues. It would be difficult to read the record here and not realize that everybody knows that petitioner is in the numbers business. Petitioner all but admits it himself. * * * He was not asked whether he is in the numbers business to give the government any leads.

Why, then, was the prosecutor so anxious to get an answer to that question, which the Government now contends is unimportant?

The record supplies part of the answer.

First, Petitioner's fear of self-incrimination under the federal criminal law was based, in substantial measure, on 26 U. S. C. 145(b), on the advice of his attorney, on his knowledge of what his answers to the challenged questions would be, and on what he had read in the newspapers (R. 131a-132a, 174a-176a; quoted in U. S. Br. 6-8, n. 3).

Second. The prosecutor had announced publicly (R. 196a) that "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws * * *."

Further (R. 197a)—

> A Justice Department spokesman said that as each witness is called, agents of the Bureau of Internal Revenue are prepared to produce income tax reports so that the jury can check his testimony.

Income tax violations would permit the Government to strike indirectly at racketeers whose activities are not covered by Federal criminal statutes.

Third. The prosecutor was particularly anxious to get an answer to the question whether petitioner was in the numbers business (R. 145a, quoted at Pet. 6; *supra*, p. 11; and see U. S. Br. 61). Indeed the whole course of the present proceeding reflects the Government's concern for an answer.

The apparent discrepancy between the Government's attitude in the record and the Government's attitude in its present brief is resolved by an examination of the cases dealing with prosecutions under 26 U. S. C. 145(b):

In order to sustain a prosecution under that section, it is first incumbent on the Government to establish that the defendant is engaged in an income producing business!

(i) The writing of able government specialists in the field establish this precise point. See Meyer Rothwacks, *Criminal Tax Prosecutions*, in 1 *Current Issues in Federal Taxation* (The American University Tax Institute Lectures: Matthew Bender & Co.) 269-289. Says Mr. Rothwacks (pp. 282, 283):

> In Section 145(b) prosecutions, the Government is required to prove receipt of income in excess of that reported. The Government is not required to prove the exact amount of corrected income as charged in the indictment; evidence of a substantial understatement of net income in the return is sufficient to support conviction [citing many cases].
>
> • • • • •
>
> The courts have sustained the Government's use of bank deposits in criminal tax prosecutions to establish taxable income where there is evidence of (1) periodic deposits in accounts which the taxpayer controls and (2) an income producing business. [Citing many cases, and quoting as follows from *Gleckman* v. *United States*, 80 F. 2d 394, 399 (C. C. A. 8), certiorari denied, 297 U. S. 709:

> "If it be shown that a man has a business or calling of a lucrative nature and is consistently, day by day and month by month, receiving monies and depositing them to his own uses, there is most potent testimony that he has income, and if the amount exceeds exemptions and deductions, that income is taxable."]

Writing a few years later, Mr. Rothwacks went on to elaborate (*Problems in Criminal Tax Prosecutions*, in 3 *id.* 297 *et seq.*, at 310-311):

> **Proof of Unreported Income by Circumstantial Evidence.**
>
> • • • • •
>
> The income, if any, in net worth, is presumed to be net income, *if certain conditions obtain.* These conditions apply equally to an expenditure case. They are: (1) that there is evidence of a possible source or sources of income to account for the expenditures of the increases in net worth; and (2) evidence of a "starting point" • • •.
>
> A substantial amount of case law has already been developed in the net worth-expenditure field. Most of the decisions are recent. They all emphasize the requirements concerning a source of income and satisfactory exclusory evidence.
>
> Proof of source of income involves no unusual problems. It should be observed that although the Government must establish a source, there need not be any direct proof of income from it [citing *United States* v. *Chapman*, 168 F. 2d 997 (C. A. 7), certiorari denied, 335 U. S. 853].

(ii) The observations of the only non-Government text writer in the field are to the same effect. See Balter, *Fraud Under Federal Tax Law*, 280 *et seq.*. In discussing "Proof of Income" under the "Expenditure Method", Mr. Balter sets forth the first requirement as follows (p. 281):

> (1) In each instance, it must be established that the defendant was engaged in an income producing business (whether lawful or unlawful) so that it would be

reasonable to presume that he realized income during the period in question [citing *Schuermann* v. *United States*, 174 F. 2d 397 (C. A. 8), certiorari denied, 338 U. S. 831; *Gleckman* v. *United States*, 80 F. 2d 394 (C. C. A. 8), certiorari denied, 297 U. S. 709, *supra;* and *United States* v. *Johnson*, 319 U. S. 503].

It is therefore perfectly apparent (a) why the prosecutor, who had announced that he would strike at numbers through the revenue laws (R. 196a), sought to obtain from the petitioner's own lips an admission that he was engaged in another income producing business, (b) why petitioner's counsel advised that an answer to the business questions would be incriminating (R. 143a, 57a), and (c) why petitioner (R. 131a-132a, 174a-176a) invoked his constitutional privilege when pressed to answer.

The Government's present efforts to minimize the importance of the business questions accordingly bespeaks, at the very least, a lack of candor.